



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL NO. 57 OF 2015

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED APPELLANT

AND

COLLINS AGUMBA ABOGE RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. Gichohi, CM in the Chief Magistrates Court at Homa Bay in Civil Case No. 57 of 2015 dated 25th June 2015)

JUDGMENT

1. The respondent was electrocuted by a live wire on 20th April 2007 as he was cutting sisal stalks along the Mbita – Sindo Road. He sustained electrical burns all over the body and attributed his accident to breach of statutory and common law duty of employment. When sued by the respondent, the appellant denied that it was liable for the accident and averred that the claim was time barred under the ***Limitation of Actions Act (Chapter 22 of the Laws of Kenya)***. The learned magistrate dismissed the contention that the claim was time barred, adjudged the appellant fully liable and awarded the respondent Kshs. 600,000/- and Kshs. 2,000.00 as general and special damages respectively.

2. The appellant appeals against the judgment on following grounds set out in the memorandum of appeal dated 6th July 2016;

1. *The Learned Trial Magistrate erred both in law and in fact by finding that the ex-parte orders granting the Respondent leave to file suit out of time were valid.*
2. *The Learned Trial Magistrate erred both in law and in fact by finding that a court had discretion to extend time in action in contract under Section 4(1) of the Limitation of Actions Act.*
3. *The Learned Trial Magistrate erred both in law and in fact by finding that investigations by the Appellant were facts of a decisive character which were outside the Respondent's knowledge.*
4. *The Learned Trial Magistrate erred both in law and in fact by failing to find that the Respondent's suit had been filed out of time.*
5. *The Learned Trial Magistrate erred both in law and in fact by awarding the Respondent as sum of Kshs. 600,000.00 general damages which was too excessive in the circumstances and did not reflect the injuries sustained by the Respondent.*

3. As this is the first appeal, this court is cognisant of its duty as succinctly summarised by the East Africa Court of Appeal in ***Selle v Associated Motor Boat Company Ltd [1968] EA 123, 126*** as follows:

Briefly put they [the principles] are that, this Court must reconsider the evidence, evaluate it

itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

4. As the hearing of the appeal, counsel for the appellant, Mr Wamaasa informed the court the issue for determination is whether the respondent's suit was statute barred. In that respect the uncontested facts are the respondent was injured on 20th April 2007. On 8th April 2013, the respondent filed an *ex-parte* Notice of Motion dated 5th April 2013 being **Homa Bay Chief Magistrates Court Misc. Civil Appl. No. 6 of 2013** under the provisions of **section 22** of the **Limitations Act (Chapter 22 of the Laws of Kenya)** (hereinafter "the **Act**") seeking an order, "That the Honourable court may be pleased to grant leave to the applicant to file suit out of time." On 12th June 2013, the court granted the respondent leave to file suit out of time against the appellant within 3 months of the order. The respondent filed the suit on 12th June 2013.

5. The issue of limitation of action was pleaded by the appellant and was thus an issue for determination at the trial. The learned magistrate held the respondent's claim was valid and that in terms of **section 27** of the **Act**, the assurances given by the appellant that the claim would be investigated and the matter settled thereafter were facts of a decisive character which were at all times outside the knowledge of the respondent.

6. Mr Wamaasa submitted that the learned magistrate erred in upholding since the suit was grounded on contract and in terms of **section 4(1)** as read with **section 27** of the **Act**, the subordinate court could not extend the time to file the suit out of time. Counsel cited the case of **Divecon v Samani [1995-1998]EA 48** where the Court of Appeal held that the provisions for extension of time did not apply for contractual claims. Counsel further submitted that the even if the subordinate court had jurisdiction to extend time, the application was filed on 8th April 2013 before the expiry of the limitation time on 20th April 2013 hence the order was unnecessary as the time had not expired.

7. The appellant further contended that the application for extension of time was brought under **section 22** of the **Act** and the respondent was not under any disability and was fully aware of the facts giving rise to the cause of action and the limitation time. In the alternative, counsel contended that even if the respondent relied on **section 27(1)** of the **Act**, the facts relied upon to support the application for extension of time were not material facts of a decisive character which were outside the respondent's knowledge.

8. Mr Onyango, counsel for the respondent, contended that the respondent's cause of action, as set out in the plaint, was not based on contract but tort. Counsel cited **Kiamokama Tea Factory Company Ltd v Joshua Nyakoni KSI HCCA No. 169 of 2009 [2015]eKLR** where the court held, following the Court of Appeal decision in **Robin Cahill and 9 Others v T. S. Nandhra and 3 Others Civil Appeal No. 57 of 2002**, that an action for breach of statutory duty is essentially a claim in tort. Counsel argued since the cause of action was grounded in tort, the respondent moved the court after the limitation period had expired. Counsel submitted that the respondent had established a factual basis for the grant of leave to file the suit out of time and that the learned magistrate trial appreciated the facts of the case which were not challenged by the appellant. Counsel maintained that failure to cite the proper section of the **Act** was not fatal as the respondent had established the factual basis of the application and proved its case.

9. The first issue for consideration is whether the respondent's cause of action was based on tort or contract. I agree with the appellant that if indeed the case was based on contract, then the subordinate court had no jurisdiction to grant leave to file the suit out of time (see **Divecon v Samani (above)**). Whether a claim is founded on tort or contract is based on the substance of the claim as set out in the pleadings. The respondent, at paragraph 5 of the plaint pleaded that the, "accident was caused by the breach of the defendant statutory duty and or common law duty of employment." This leaves no doubt

that the respondents claim was not founded on contract. I agree with the decision in ***Kiamokama Tea Factory Company Ltd v Joshua Nyakoni KSI HCCA No. 169 of 2009 [2015]eKLR*** that a breach of statutory duty, as pleaded by the respondent, is a tort (see also ***Kenya Cargo Handling Services Ltd v David Uggwang NRB CA Civil Appeal No. 64 of 1984 [1985]eKLR***). My view is further fortified by ***Black's Law Dictionary (8th Ed.)*** which defines tort as, “a civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons on an employer to his employee is clearly a tort.”

10. The respondent's action, being one founded on tort, became statute barred on 20th April 2010, three years after the cause of action arose as prescribed by **section 4(1)** of the **Act**. The respondent was therefore entitled to apply for leave to file the suit out of time. I now turn to the issue of limitation.

11. The respondent moved the court under **section 22** of the **Act**. The *ex-parte* application for leave was supported by the respondent's deposition dated 5th April 2013. In that deposition, the respondent stated that he was injured at work on 20th April 2007. He followed up his treatment and as evidence he exhibited the P3 medical report form dated 6th September 2007 and a medical claim form made to Co-operative Insurance Company of Kenya Ltd signed by him on 7th April 2007. He also exhibited Employers Accident Report form dated 4th June 2007, medical notes and a discharge summary from Nyangena Hospital showing that he was admitted on 20th April 2007 and discharged 24th April 2007. He averred that due to the time taken in settling the claim, he instructed his advocate to write the demand letter dated 17th September 2012 and to which the appellant responded by the letter dated 30th October 2012 seeking further documentation while denying liability. The respondent deponed, “*That failure to file the case on time was not deliberate but occasioned by the promises given by the respondent that they will settle the case and that I withhold court action.*”

12. Neither the trial court nor this court had the benefit of the court's ruling on the application for leave to file the suit out of time but nevertheless the application was granted. This does not present a problem as it is now settled that *ex-parte* leave granted may be challenged at the trial (see ***Yunes Oruta v Samuel Mose Nyamato CA Civil Appeal No. 96 of 2004 (UR)***). In ***Mary Wambui Kabuga v Kenya Bus Services Ltd Civil Appeal No. 195 of 1995 [1997]eKLR***, Akiwumi JA expressed the view that;

It must be remembered that even when the judge grants leave, there is nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the judge in chambers who gave leave.

13. The respondent's situation does not quite fit within the circumstances envisaged in **section 22** of the **Act**. The section provides as follows;

22. *If, on the date when a right of action accrues for which a period of limitation prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of six years from the date when the person ceased to be under a disability or dies, whichever event first occurs, notwithstanding that the prescribed period of limitation has expired:*

Provided that -

- i. this section does not affect any case where the right of action first accrues to a person who is not under a disability and through whom the person under a disability claims;*
- ii. when a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under disability, no further extension of time is allowed by reason of the disability of the second person;*
- iii. an action to recover land or to recover money secured on a mortgage of land may not be brought*

- by a person by virtue of this section after the end of thirty years from the date on which the right of action accrued to that person or to some person through whom he claims;
- iv. this section does not apply to an action to recover a penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law.
- v. **in actions for damages for tort—**

(a) this section does not apply unless the plaintiff proves that the person under the disability was not, at the time when the right of action accrued to him, in the custody of his parent; and

(b) this section has effect as if the words “six years” were replaced by the words “three years.”

14. The effect of **section 22** of the **Act** is that time does not run when the cause of action accrues while the applicant is under a disability thus leave is not required as the applicant is entitled to file a claim in tort three years after the disability ceases. “Disability” as contemplated under **section 22** of the **Act** does not include physical disability or illness but refers to persons who are minors or are of unsound mind according to **section 2(b)** of the **Act**. In *Gathoni v Kenya Co-Operative Creameries Ltd [1982] KLR 104* the Court of Appeal, in relation to **section 22** of the **Act**, observed that:

The disability relied on by the applicant being a physical disability, the nature and the extent of which was not revealed, the learned judge dismissed this ground because disability in the statutory context of section 2(2)(b) of the Limitation of Actions Act does not include physical disability ... Of course, if the applicant were under a relevant disability, she would not need the leave of the court to commence her action.

From the facts I have outlined the respondent was not under disability at the time the cause of action accrued hence **section 22** of the **Act** was not applicable.

15. Assuming that the reference to **section 22** of the **Act** in the application for leave was an error and that the respondent intended to refer to **section 27** of the **Act** then different considerations would apply. **Section 27** provides as follows;

27 (1) Section 4 (2) does not afford a defence to an action founded on tort where -

(a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which -

(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the

action was brought.

(3) *This section does not exclude or otherwise affect -*

(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4 (2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

16. **Section 30** of the **Act** defines crucial phrases used in **sections 27, 28** and **29** of the **Act** and the relevant ones are as follows;

30(1) In sections 27, 28 and 29 of this Act, any reference to the material facts relating to a cause of action is a reference to one or more of the following—

- a. the fact that personal injuries resulting from the negligence, nuisance or breach of duty constituting that cause of action;*
- b. the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty;*
- c. the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.*

(2) For the purposes of sections 27, 28 and 29 of this Act any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them, would have regarded at that time as determining, in relation to that cause of action, that (apart from section 4(2) of this Act) an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action.

17. The scope of **section 27** of the **Act** was discussed in **Gathoni v Kenya Co-Operative Creameries Ltd (above)** where the **Court of Appeal** expressed the following view;

The applicant's application for leave was made under Section 27, where the applicant has to show that her failure to proceed in time was due to material facts of a very decisive character being outside her knowledge (actual or constructive) ... Section 30(3) of the Act provides that for the purposes of Section 27 a fact shall be taken at any particular time to have been outside the knowledge (actual or constructive) of a person, if but only if (1) he did not know that fact; and (2) in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and (3) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances In section 30(5) "appropriate advice" is defined as meaning in relation to any facts or circumstances "advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be ... The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen

would reasonably have done.

18. In order to demonstrate the basis for leave to file the case out of time, the respondent produced several letters between his advocate and the appellant. The demand letter from the respondent's advocate was written on 30th October 2012 and acknowledged by the appellant's letter of 11th October 2012 (Exhibit 13) which requested the appellant to hold the matter in abeyance while the claim was being investigated. The appellant's further letter 30th October 2012 (Exhibit 12) called for documents which were forwarded by the respondent's advocate's letter dated 27th November 2012 (Exhibit 14). In cross-examination, the respondent testified that he knew that he was supposed to file the suit within 6 years but that he failed to file the suit because he was unwell. He further stated that the appellant kept telling him to wait until the limitation period elapsed.

19. From the evidence adduced, it is clear that the respondent knew that he was injured. He applied for and obtained a P3 form and received relevant medical documents including reports from the appellant in 2007 which would have enabled him to file suit. He did in fact lodge a medical claim with Co-operative Insurance Company. The delay from the period from the time from 2007 when he had these documents in his possession to September 2012 when his advocates wrote the first demand letter is unexplained. The appellant admitted in cross examination that he knew that he was supposed to file suit. I therefore find and hold that the respondent had knowledge of material facts which would have enabled him file suit within three years of the accrual of the cause of action.

20. In *Tana and Athi Rivers Development Authority v Joseph Mbindyo and 3 Others* NYR CA Civil Appeal No. 253 of 2011 [2013]eKLR, the Court held as follows

[13] From the foregoing provisions it is clear that before the court granted the ex parte leave to the respondents to file the suit out of time it had to be satisfied that the material facts relating to the cause of action were not within their knowledge until after time limited for filing the suit had expired. In the instant case, the respondents' argued that the reason for the delay was due to the ongoing negotiations' between the parties. We agree with Mr. Okeyo that the aforesaid reason does not constitute material facts which were not within the knowledge of the respondents as envisaged under section 27(2) of the Limitation of Actions Act.

21. The decision I have cited is authority for the fact that ongoing negotiation does not constitute material facts which were not within the knowledge of the respondent. In *Devicon Ltd v Samani (above)*, the Court of Appeal held that the failure to institute a suit on time could not be excused on account of illiteracy. In that case the respondent's son died and after the expiry of the limitation period. She thereafter sought legal advice from her counsel who informed her that the claim was time barred but she could file suit.

22. I therefore disagree with the learned magistrate that the fact that the appellant was asked to hold the matter in abeyance constitutes material facts of a decisive character which were outside the knowledge of the respondent before the limitation period expired. The respondent knew the facts constituting the cause of action. He had all the supporting documentation during the period between 2007 and 2012.

23. The appeal is allowed. The suit filed in the subordinate court is dismissed. The appellant shall have costs of the trial and of this appeal.

DATED and DELIVERED at HOMA BAY this 11th day of March 2016.

D.S. MAJANJA

JUDGE

Mr Wamaasa instructed by Wamaasa and Company Advocates for the appellant.

Mr Onyango instructed by K'owinoh and Company Advocates for the respondent.